Supreme Court, U.S.
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No. 99-384

In The

Supreme Court of the United States

ROBERT BOGETTI & SONS, ROBERT BOGETTI & SONS II, ROBERT PETER BOGETTI, AND DEOLINDA MARIE BOGETTI,

Petitioners,

v.

BANK OF AMERICA, N.T. & S.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Bank of America, N.A., formerly known as Bank of America NT&SA, respondent herein, submits the following information pursuant to United States Supreme Court Rule 29.6 identifying respondent's parent corporation and listing any publicly held company that owns ten percent or more of the corporation's stock:

Bank of America Corporation, a Delaware corporation, holds 100% of the outstanding shares of NB Holdings Corp., a Delaware corporation, which in turn holds 100% of the outstanding shares of Bank of America, N.A., formerly known as Bank of America NT&SA.

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INTRODUCTION

This Opposition is submitted by Bank of America, N.A., formerly known as Bank of America NT&SA (hereinafter "Bank of America").

Petitioners seek review of the unpublished decision of the Ninth Circuit Court of Appeals which affirmed summary judgment against them. At the trial level, Bank of America had sought a declaratory judgment from the bankruptcy court as to the terms and conditions of petitioners' confirmed Chapter 11 plan of reorganization, and in particular, a determination of the effect of 11 U.S.C. § 506(a) on Bank of America's claims. In response, petitioners (i) opposed bankruptcy court jurisdiction, (ii) filed cross-claims asserting damages in excess of $100 million for alleged abuse of process and malicious prosecution, and (iii) argued that a California state court order entered in a post-plan of reorganization lawsuit created issue preclusion as to the meaning of the Chapter 11 plan of reorganization.

Bank of America moved the bankruptcy court for summary judgment on both its complaint and on petitioners' cross-claims. After briefing and oral argument, the bankruptcy court granted summary judgment to Bank of America, and appeals followed to the Bankruptcy Appellate Panel of the Ninth Circuit (hereinafter "BAP") and to the Ninth Circuit Court of Appeals, which, in each instance, affirmed the summary judgment in unpublished opinions.

Petitioners claim that each of three courts below erred in not granting issue preclusive effect to the California state court order, which set aside a prejudgment

right to attach order entered under California state law. Each court below has found that petitioners failed to sustain their burden to establish the elements necessary for issue preclusion. Petitioners now argue that the courts below improperly placed upon them the burden to establish issue preclusion. They would have the burden shifted to Bank of America to *negate* petitioners' issue preclusion defense in order to obtain summary judgment. Thus, petitioners impliedly argue to reverse the *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) burden shifting rules which this Court established well over a decade ago.

THE UNITED STATES SUPREME COURT SHOULD SUMMARILY DENY THE PETITION

A. PETITIONERS' DISTORTION OF THE RECORD BELOW PROVIDES NO BASIS FOR SUPREME COURT REVIEW.

Petitioners once more reargue the facts of their case, asserting, incorrectly, that they raised sufficient "facts" below to avoid the imposition of summary adjudication under the principles enunciated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In fact, the basis for the rulings from which they appeal is that petitioners introduced no facts at all to the bankruptcy court identifying why the state court entered the writ quashing order which petitioners were arguing was issue preclusive. Because petitioners presented no material disputed facts requiring trial, the bankruptcy court granted summary judgment to Bank of America.

Celotex clarified which party has the burden of proof under Federal Rule of Civil Procedure 56(e). This Court unambiguously held that the party moving for summary judgment is not required to negate the other party's defenses: " . . . we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar material negating the opponent's claim . . . " (*Id.* at 323.) That holding is clear and need not be revisited in this case.

Bank of America brought a well supported motion for summary judgment. It was not required to negate petitioners' alleged issue preclusion defense. The burden to establish that defense or to raise a triable issue of fact rested squarely upon petitioners, and nothing in *Celotex* has changed that burden.

Petitioners would have the United States Supreme Court pick through the trial court record to make inferences about the basis of a prior state court order, and from such gleanings reach conclusions opposite to those made by the trial court. The petition is filled with bits and pieces of disconnected matter, which petitioners hope to coalesce into a substitute for that which they should have presented, but did not. Snatching a sentence from here and a sentence from there, petitioners argue that they sustained their burden on issue preclusion. No court has agreed with petitioners.

Federal courts must defer to state law in giving collateral estoppel effect if the prior judgment is that of the state court. *First National Bank v. Russell* (*In re Russell*), 76 F.3d 242, 244 (9th Cir. 1996). The prior order at issue

below is that of a California Superior Court, and therefore California law applies. California law establishes the collateral estoppel elements to be proved and places the burden of proof on petitioners. *Lucido v. Superior Court*, 51 Cal.3d 335, 341 (1990), 272 Cal.Rptr. 727, *rehearing denied*, 1990 Cal. LEXIS 4797 (October 25, 1990), *cert. denied*, 500 U.S. 920 (1991). The party asserting collateral estoppel must prove these elements: "To sustain this burden, the party *must* introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action. Any reasonable doubt as to what was decided by a prior judgment *shall be resolved against allowing* collateral estoppel effect." *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1321 (9th Cir. 1992) (emphasis supplied); *United States v. Lasky*, 600 F.2d 765, 769 (9th Cir. 1979), *cert. denied*, 444 U.S. 979 (1979).

It is undisputed that petitioners failed to introduce into the trial court record the basis for the state court's prior writ quashing order. They failed to cite the "controlling facts" and to "pinpoint the exact issues litigated." The bankruptcy court ruled that it could not determine from the record whether the state court's ruling was based on procedural infirmity or substance, and therefore would not give it preclusive effect. Because petitioners failed to identify any material issues of fact to be tried, the bankruptcy court properly granted Bank of America's motion for summary judgment and thereafter entered judgment.

Petitioners appealed to the BAP and for the very first time attempted to supplement the record by urging that Panel to take judicial notice of a transcript of the state court proceedings which petitioner contended supported

their case, but which had never been presented below. The BAP refused to supplement the trial court record and affirmed the bankruptcy court's judgment in an unpublished decision.

Petitioners then appealed to the Ninth Circuit Court of Appeals and identified as error both the BAP's refusal to take belated judicial notice and the failure to accord issue preclusion based on the trial court record. The Ninth Circuit rejected both contentions and affirmed in an unpublished decision.

Petitioners have asked this Court to find that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's supervisory power, described in Supreme Court Rule 10(a). The contrary is true. The Ninth Circuit applied well established law consistent with precedent. There is no basis for Supreme Court intervention, and the petition should be summarily denied.

B. PETITIONERS SET FORTH NO COMPELLING REASON TO JUSTIFY THE SUPREME COURT'S EXERCISE OF DISCRETION IN GRANTING THE PETITION.

Rule 10 of the Supreme Court Rules identifies criteria under which the Supreme Court considers petitions for a writ of certiorari:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither

controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power.
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioners set forth no compelling reason for this Court to exercise its discretion. At best, petitioners claim nothing more than erroneous factual holdings or the misapplication of a rule of law on preclusion, which rule they

admit is not controversial. The unpublished opinion of the Ninth Circuit does not conflict with a decision of any other United States Court of Appeals, with the decisions of another state court of last resort, or with any decision of the United States Supreme Court.

The Question Presented for Review by petitioners implicates no important federal question that has not been settled by this Court. There simply is no compelling reason for the United States Supreme Court to grant the petition, and certainly no reason in accord with the criteria established under Supreme Court Rule 10.

Petitioners are merely seeking another appeal from the bankruptcy court's interpretation of a bankruptcy plan of reorganization. If permitted, this appeal would be their third. Their first appeal failed at the BAP, their second failed at the Ninth Circuit, and their third attempt should now be summarily denied.

CONCLUSION

The petition for writ of certiorari in this case makes no colorable claims within the criteria of Rule 10 of the Supreme Court Rules. The petition is nothing more than

an inappropriate third appeal, and as such it should be rejected.

DATED: September 30, 1999

Respectfully submitted,

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